MAR 20 1981

IN THE

Supreme Court of the United States

October Term, 1980

No. 80-1419

ETHEL HAMILTON,

Petitioner,

– v –

WILFORD STOVER,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH DISTRICT

RICHARD A. HAMILTON
Metzger & Hamilton
455 Spitzer Building
Toledo, Ohio 43604
Telephone: (419) 244-8393
Attorney for Respondent.

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES i

STATEMENT OF THE CASE 1

I. Nature of the Case 1

II. Statement of Facts 1

REASON FOR NOT GRANTING THE WRIT 1

I. Mere Allegations of Willful, Reckless, Deliberately Indifferent and/or Grossly Negligent Conduct by a Municipal Police Officer Are Not Sufficient to State a Cause of Action under 42 USC §1983, 28 USC §1342, 28 USC §1331 and the United States Constitution. 1

CONCLUSION 11

SERVICE 11

TABLE OF AUTHORITIES

PAGE

I. Federal Cases

Amen v. City of Dearborn,
532 F. 2d 554 (6th Cir. 1974) 8

Baker v. McCollan,
443 U.S. 137, 61 L Ed. 2d 450, 99 S. Ct. 2710 (1979) .. 5

Bivens v. Six Unknown Federal Narcotics Agents,
403 U.S. 388, 29 L Ed. 2d 619, 91 S. Ct. 1999 (1971) .. 8

Bosely v. City of Euclid,
496 F. 2d 193 (6th Cir. 1974) 8

Butz v. Economu,
438 U.S. 478, 57 L Ed. 2d 895, 98 S. Ct. 2894 (1978) .. 5

Carlson v. Green,
_____ U.S. _____, 48 U.S. L.W. 4425 (April 22, 1980) 8

Davis v. Passman,
442 U.S. 228, 60 L Ed. 2nd 846, 99 S. Ct. 2264 (1979) . 8

Denman v. Leedy,
479 F. 2d 1092 (1973) 4

Eisenstadt v. Baird,
405 U.S. 645, 31 L Ed. 2d 551, 92 S. Ct. 1208 (1972) .. 8

Griswold v. Connecticut,
381 U.S. 479, 14 L Ed. 2d 510, 85 S. Ct. 1678 (1965) .. 9

Hampton v. City of Chicago,
484 F. 2d 602 (7th Cir. 1973) cert. den. 415 U.S. 917 .. 9

Hanna v. Drobnick,
514 F. 2d 393 (6th Cir. 1975) 9

Henig v. Odorioso,
385 F. 2d 491, certiorari denied 390 U.S. 1016,
88 S. Ct. 1269, 12 L Ed. 166, rehearing denied
391 U.S. 929, 88 S. Ct. 1814, 20 L Ed. 2d 671 (1968) .. 6

Kelley v. Johnson,
425 U.S. 238, 47 L Ed. 2d 708, 96 S. Ct. 1440 (1976) .. 9

Kenosha v. Bruno,
412 U.S. 507, 37 L Ed. 2d 109, 93 S. Ct. 2222 (1973) .. 9

Martinez v. California,
444 U.S. 277, 62 L Ed. 2d 481, 100 S. Ct. 553 (1980) .. 7

Meyer v. Nebraska,
262 U.S. 390, 67 L Ed. 1024, 43 St. Ct. 625 (1923) 9

Orr v. Trinter,
Court of Appeals, (6th Cir. 1971) 444 F. 2d 138,
certiorari denied 408 U.S. 943, 92 S. Ct. 2847,
33 L Ed. 2d 767, rehearing denied 409 U.S. 898,
93 S. Ct. 95, 35 L Ed. 2d 157 (1971) 6

Parratt v. Taylor,
No. 79-1734 Cert. granted October 20, 1980 10

Pierson v. Ray,
386 U.S. 547, 18 L Ed. 2d 288, 87 S. Ct. 1213 (1967) .. 10

Procunier v. Navarette,
434 U.S. 555, 55 L Ed. 2d 24, 98 S. Ct. 855 (1978) 10

Roe v. Wade,
410 U.S. 113, 35 L Ed. 2d 147, 93 S. Ct. 705 (1973) ... 10

Scheuer v. Rhodes,
416 U.S. 232, 40 L Ed. 2d 90, 94 S. Ct. 1683 (1974) ... 5

Stanley v. Illinois,
405 U.S. 645, 31 L Ed. 2d 551, 92 S. Ct. 1208 (1972) .. 10

Walton v. Salter,
547 F. 2d 824 (5th Cir. 1976) 6

II. State Cases

Agnew v. Porter,
23 Ohio St. 2d 18, 260 NE 2d 830 (1970) 2

McDermott v. Irwin,
148 Ohio St. 67, 73 NE 2d 86 (1947) 2

III. United States Constitution

First Amendment 1

Fourth Amendment 1,8

Ninth Amendment 1

Fourteenth Amendment 1,3,4,5,8

IV. Statutes

28 USC §1331 1,2

28 USC §1343 1,2

42 USC §1983 1,2,3,4,5,6,7,8,9,10

V. State Statute

Ohio Revised Code §701.02 2,3

IN THE

October Term, 1980

No. 80-1419

ETHEL HAMILTON,

Petitioner,

– v –

WILFORD STOVER,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH DISTRICT

To the Chief Justice and the Associate Justices of the Supreme Court of the United States.

STATEMENT OF THE CASE

I. NATURE OF CASE

This action arose out of an automobile collision between Wilford Stover, a policeman employed by the Village of Plymouth, Ohio, on duty at the time of the accident, and plaintiff's decedent, Glen Hamilton. At the time of the collison, Officer Stover was responding to an emergency call in the course of his duties when decedent caused his vehicle to turn into the path of the automobile driven by Stover. Petitioner is now seeking to invoke the provisions of 28 USC §1331 and §1342, 42 USC §1983, and the First, Fourth, Ninth and Fourteenth Amendments to the United States Constitution.

II. STATEMENT OF FACTS

The events that formed the basis for this action occurred on Saturday evening, April 15, 1978 in the Village of Plymouth, Ohio, when Wilfred Stover, a policeman employed by the Village of Plymouth received an emergency call transmitted over the radio in the vehicle he was driving while he was on duty. The call referred to a man trapped in an automobile that was on fire, and Officer Stover immediately responded to the call, turned on his emergency equipment and proceeded to the scene of the occurrence. As he was proceeding under emergency conditions, decedent Glen Hamilton turned his vehicle into the path of the vehicle driven by Officer Stover and a collision occurred.

Petitioner is Mr. Hamilton's widow who filed suit as his personal representative pursuant to Ohio Law. She has claimed that her deceased husband's rights under 42 USC §1983 were violated as a result of this automobile collision as stated in the Petition for a Writ of Certiorari. The United States District Court for the Northern District of Ohio, Western Division sustained Respondent's Motion to dismiss and this decision was affirmed by the United States Court of Appeals for the Sixth Circuit without hearing. The opinions of these Courts have been included as Appendices A and B in the Petition for Certiorari.

REASON FOR NOT GRANTING THE WRIT

I. MERE ALLEGATIONS OF WILLFUL, RECKLESS, DELIBERATELY INDIFFERENT AND/OR GROSSLY NEGLIGENT CONDUCT BY A MUNICIPAL POLICE OFFICER

ARE NOT SUFFICIENT TO STATE A CAUSE OF ACTION UNDER 42 USC §1983, 28 USC §1343, 28 USC §1331 AND THE UNITED STATES CONSTITUTION.

Petitioner has advanced two reasons for granting the Writ of Certiorari. Because these two reasons are intertwined, Respondent will treat them as one for the purposes of this Brief.

The United States District Court for the Northern District of Ohio, Western Division and the Sixth Circuit Court of Appeals have held that the allegations contained in Petitioner's complaint, based on the factual situation involved, do not give rise to a cause of action under 42 USC §1983. Petitioner herein has admitted in her Petition that the police officer was acting in the scope of his employment during an emergency run in aid of a person, other than Petitioner's decedent, who was in need of assistance, and that his action was pursuant to §701.02 of the Ohio Revised Code, which reads:

> "Members of the police department engaged in the operation of a motor vehicle responding to an emergency call: . . . Policemen shall not be personally liable for damages for injury or loss to persons or property and for death caused while engaged in the operation of a motor vehicle while responding to an emergency call."

Petitioner has admitted that this section applies to the case now before the Court.

Petitioner further admits that under the cases of *Agnew v. Porter*, 23 Ohio St. 2d 18, 260 NE 2d 830 (1970) and *McDermott v. Irwin*, 148 Ohio St. 67, 73 NE 2d 86 (1947) that the Supreme Court of Ohio has upheld this statute under conditions similar to those presented here.

In *Agnew*, the Ohio Supreme Court held that Ohio Revised Code §701.02 was a full defense to any action for damages for personal injury against a policeman for negligence while engaged in the operation of a motor vehicle responding to an emergency call. Further, the Court held that the officer is not required to determine whether or not the call is an emergency. The officer is entitled as a matter of law to accept the call at face value and has no duty to independently determine whether or not an actual emergency exists or to question the judgment of the officer issuing such message.

The *McDermott* case, in particular, is parallel to the case now before the Court. In *McDermott*, the plaintiff received injuries while

a passenger in an automobile which was struck by a City of Youngstown ambulance. The claim was that the ambulance failed to sound the siren, whistle or bell and came through a red light on the wrong side of the highway. The Court held that the immunity clause, based on the emergency statute, was fully applicable, stating that the reasoning behind this was sound because the State had a great interest in whether or not emergency runs are made by its officials and police officers. The immunity granted by the statute far overrides any potential loss that may be suffered by abuse of this process because criminal sanctions are still available against the officer or individual who violated any state laws while making an emergency run. The state of Ohio merely hopes to cloak the officers while in the scope of an emergency with immunity from civil harassment. This is surely within the parameters of the police protection of the general public.

The Ohio immunity statute seeks to protect officers, while in the scope of their duty who are attempting to aid members of the general public, from suits by individuals who may be injured indirectly as the result of police response to an emergency situation. In the case now before the Court, Officer Stover did not direct his actions toward the decedent, but rather toward aiding an individual who was in an emergency situation. Under these circumstances, he should be entitled to the immunity given him by the Ohio statute.

Petitioner is now seeking to circumvent this immunity provision of the Ohio law by attempting to bring this cause of action under the Fourteenth Amendment to the United States Constitution and, in particular, 42 USC §1983, the Civil Rights Legislation evolving after the Civil War. Prior to discussing the effect of §1983, Respondent must point out that Petitioner has yet to seek redress in Ohio Courts to determine whether the immunity clause of §701.02 of the Ohio Revised Code applies rather as stated in her Brief. She admits its validity, an admission in essence, therefore, that she is seeking §1983 relief in order to circumvent the provisions of the Ohio Revised Code.

The proper course would be for Petitioner to test whether or not an emergency run was being made and whether or not the coverage provided by Ohio Revised Code §701.02 really does, in fact, apply to the accident in question. Further, by doing so, if Petitioner felt that §701.02 is too broad an immunity or that the immunity granted is unconstitutional, those matters could

be tested in the proper manner — first in Ohio Courts and then, if necessary, to the United States Supreme Court. Petitioner has not chosen this manner in which to proceed, but rather is, in the numerous cases cited out of context, attempting to argue that §1983 applies to any action by state officials, regardless of how or what occurs, and against whom said action is directed.

It is more than obvious from examining the case law under 42 USC §1983, that this was not the purpose or import of the act. Petitioner is attempting to bring this case under the scope of 42 USC §1983 claiming that an automobile accident involving a state official would deprive a party of his rights under the Fourteenth Amendment. There is no allegation in the complaint that the acts committed or alleged to have been committed by the Respondent Stover were acts directed, under color of law, against Petitioner's decedent. The only acts alleged against Stover were that he was grossly negligent in the driving of his police vehicle and, as admitted in Petitoner's Brief, was on an emergency run. If, in fact, these allegations were true, Officer Stover would be subject to criminal penalties under Ohio law. However, in furtherance of the protection of the general public, the State of Ohio has seen fit to grant immunity to such police officers while in the course of an emergency run, feeling that this far overrides the potential danger of said officers in abusing their driving privileges. Stover's acts were not designed to affect decedent or deprive him of any of his constitutionally protected rights; rather his acts were those of an officer responding to an emergency call and seeking to give help to a person in dire need.

The Courts have long given recognition to limited immunity for public officials. We call the Court's attention to the case of *Denman v. Leedy*, 479 F. 2d 1092 (1973). *Denman* involved a domestic squabble and plaintiff Denman brought an action under 42 USC §1983 against the Clerk of Courts for Wooster, Ohio, and other people. The allegations against the Clerk were that he failed to set bail pursuant to Ohio statutes and thereby denied Denman his rights of freedom and bail. The Court of Appeals, in dismissing this action under §1983, said the defendant Clerk was within the scope of his official quasi-judicial duties and was entitled to immunity.

This Court, in the case of *Scheuer v. Rhodes,* 416 U.S. 232, 40 L Ed. 2d 90, 94 S. Ct. 1683 (1974), the "Kent State" case, held that the concept of executive immunity of public officials assumes that they may err and that it is better to risk some error and possible injury from such error than not to decide whether to act at all, for the public interest requires decisions and action to enforce laws for the protection of the public. Clearly, that is the reason for granting police officers immunity for emergency runs under the Ohio statute. It would be a terrible thing if an officer would have to worry about being sued every time he responded to an emergency situation on the highways, and the public would suffer greatly if the officers did not respond quickly.

Respondent would also like to call the Court's attention to the case of *Baker v. McCollan,* 443 U.S. 137, 61 L Ed. 2d 450, 99 S. Ct. 2710 (1979), a case cited by Petitioner. In *Baker v. McCollan,* the plaintiff's brother had falsely obtained a duplicate of plaintiff's driver's license and subsequently was arrested for a violation. He gave as his identification the falsely obtained driver's license, was subsequently released on bond, and forfeited same. The plaintiff Baker was subsequently arrested for his brother's crime based on identification given by the falsified driver's license and was detained for a period of seven (7) days. Suit was brought under 42 USC §1983, claiming that the arrest and detention were in violation of the Fourteenth Amendment. This Court held that the Fourteenth Amendment does not protect against all deprivations of liberty, but only those deprivations accomplished "without due process of law." The Court further held that the sheriff or custodian is not expected to conduct an independent investigation into every arrest made pursuant to a warrant, but rather that he had a right to rely on the fact that the warrant was legal on its face. The Court held that the tort of false imprisonment does not become a violation of the Fourteenth Amendment merely because the defendant was a state official.

Also, in the case of *Butz v. Economu,* 438 U.S. 478, 57 L Ed. 2d 895, 98 S. Ct. 2894 (1978), the Department of Agriculture unsuccessfully tried to revoke or suspend respondent's registration as a commodities futures company. Suit was brought against Butz and others within the Department and the Court

held that officers may have immunity where necessity of job protection overrides the possible damage done or which might be done from abuse of the authority granted to the officers where the rights of the general public are to be protected.

In addition, the Courts have held that in order to bring a claim under 42 USC §1983, that it is essential that a claim must show that the plaintiff suffered deprivation of a federally protected right, privilege or immunity as the result of the alleged action taken by the defendant. See *Orr v. Trinter,* Court of Appeals, (6th Cir. 1971) 444 F. 2d 138, certiorari denied 408 U.S. 943, 92 S. Ct. 2847, 33 L Ed. 2d 767, rehearing denied 409 U.S. 898, 93 S. Ct. 95, 35 L Ed. 2d 157 (1971). Appellant has filed only a complaint setting forth the fact that an automobile accident occurred and has attempted to obscure the facts therein by claiming wanton and willful misconduct. There is no showing in the complaint on its face that the defendant has violated any constitutional right of the decedent and under the reasoning of *Orr v. Trinter,* the complaint rightfully was dismissed.

In addition, *Henig v. Odorioso,* 385 F. 2d 491, certiorari denied 390 U.S. 1016, 88 S. Ct. 1269, 12 L Ed. 166, rehearing denied 391 U.S. 929, 88 S. Ct. 1814, 20 L Ed. 2d 671 (1968), held that it is necessary to show that the force or power used was directed at the particular defendant and denied him due process of law. In this case, Officer Stover directed no particular action at the decedent, but was rather in the course and scope of an emergency run and was involved in an automobile collision with the decedent. Clearly, under *Henig,* no violation of the decedent's constitutionally protected rights occurred.

The Court of Appeals for the Sixth Circuit, in deciding this case in favor of Respondent, followed the decision of the Fifth Circuit in *Walton v. Salter,* 547 F. 2d 824 (5th Cir. 1976). In *Walton,* the widow of a pedestrian who was struck and killed by a police car while responding to the call of an armed robbery in progress, filed a Civil Rights Action for damages against the police officer. The District Court dismissed the complaint for lack of federal jurisdiction holding that a negligence action does not provide a basis for federal jurisdiction under 42 USC §1983. The Fifth Circuit Court of Appeals, in affirming the District Court, held:

> "We affirm the District Court on the narrow ground that the complaint in this case simply does not assert the theory advanced by plaintiff before us. It states only that the actions of the officers in the city with respect to the Walton accident are negligent and in willful and wanton disregard for the safety of others."

Very similar language was used by Petitioner in this case. The Court went on to state:

> "Plaintiff therefore has failed to plead the claim that she asserts is sufficient under §1983 and instead has pleaded one which she concedes cannot be the basis of federal jurisdiction: an isolated act of negligence."

This Court, in the case of *Martinez v. California*, 444 U.S. 277, 62 L Ed. 2d 481, 100 S. Ct. 553 (1980) has reaffirmed this position. In *Martinez*, Appellant's decedent, a 15 year old girl, was murdered by a parolee five months after his release from prison despite his history as a sex offender. Suit was brought in a California Court under state law and under 42 USC §1983 claiming that the decedent was subjected to a deprivation of her life without due process of law and that the state officials were, therefore, liable in damages for the harm caused by the parolee. This Court held that the California immunity statute is not unconstitutional when applied to defeat a tort claim arising under state law. This Court, in discussing the California statute, said:

> "This statute merely provides a defense to potential state tort liability. At most, the availability of such a defense may have encouraged members of the parole board to take somewhat greater risks of recidivism in exercising their authority to release prisoners than they otherwise might. But the basic risk that repeat offenses may occur is always present in any parole system. Legislative decisions that have an incremental impact on the probability that death will result in any given situation — such as setting the speed limit at 55 M.P.H. instead of 45 — cannot be characterized as state action depriving a person of life just because it may set in motion a chain of events that ultimately leads to the random death of an innocent bystander."

The Ohio immunity statute has merely set this protection for its police officers while on emergency runs. It is clear then that the Sixth Circuit Court of Appeals was correct in sustaining the dismissal of the complaint filed by the Petitioner in the United States District Court.

The cases cited by Petitioner in support of her Petition are distinguishable from the matter before the Court. These cases will be

examined and discussed in alphabetical order.

Amen v. City of Dearborn, 532 F. 2d 554 (6th Cir. 1974) raised a jurisdictional question, the issue being whether all of the plaintiffs had a claim in excess of $10,000.00. The decision of the Court was on that issue of jurisdiction.

Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388, 29 L Ed. 2d 619, 91 S. Ct. 1999 (1971) arose from a complaint against a defendant who, acting under color of federal authority, made a warrantless entry of plaintiff's apartment, searched it, and arrested him for a narcotics violation. This Court found no probable cause for the entry and held that plaintiff was deprived of Fourth and Fourteenth Amendment rights. Defendants' acts, in contrast to the matter now before the Court, were directed only against the individual plaintiff.

Bosely v. City of Euclid, 496 F. 2d 193 (6th Cir. 1974) was a class action brought by tenants of a municipally-owned low income housing project against the city and its officials, and raised a jurisdictional question. The Court found that it had jurisdiction over the defendants but held that the appellants had failed to demonstrate a "legitimate claim of entitlement" under 42 USC §1983.

Carlson v. Green, ____ U.S. ____, 48 U.S. L. W. 4425 (April 22, 1980) was an action brought in the District Court for Indiana on behalf of a decedent prisoner who allegedly died as the result of prison officials' failure to provide him with proper medical attention. Defendants contended that an action under 42 USC §1983 was precluded by the Federal Tort Claims Act. This Court held that there was jurisdiction under 42 USC §1983 which was not preempted by the Federal Tort Claims Act against this class of federal employees.

Davis v. Passman, 442 U.S. 228, 60 L Ed. 2d 846, 99 S. Ct. 2264 (1979) was a sex discrimination case in which the plaintiff claimed that Congressman Passman had discriminated against her by reason of sex. The Court held that a proper case of sex discrimination had been pleaded and, therefore, because this was a deprivation of rights without due process of law, the Court chose to review the matter.

Eisenstadt v. Baird, 405 U.S. 645, 31 L Ed. 2d 551, 92 S. Ct. 1208 (1972) was a case involving an Equal Protection

Clause claim and the Court said that because unmarried women were being treated differently from married women, there was a violation of the Equal Protection Clause and a proper suit under 42 USC §1983.

Griswold v. Connecticut, 381 U.S. 479, 14 L Ed. 2d 510, 85 S. Ct. 1678 (1965) the Court held that forbidding the use of contraceptives violated the rights of marital privacy which were within the penumbra of specific guarantees in the Bill of Rights. It was held that this denial by statute was unreasonable under those circumstances.

Hampton v. City of Chicago, 484 F. 2d 602 (7th Cir. 1973) cert. den. 415 U.S. 917, was brought under 42 USC §1983 for damages arising out of an alleged illegal police raid and raised an allegation of conspiracy to directly deprive the plaintiffs of their civil rights. The Court held that the immunity clause would not grant protection against a 42 USC §1983 action under circumstances in which the acts were allegedly directed against the plaintiffs personally.

Hanna v. Drobnick, 514 F. 2d 393 (6th Cir. 1975) involved a city building inspection ordinance and, because the ordinance was not declared unconstitutional, it was presumed to be valid and, therefore, officials acting under color of this authority were not acting in bad faith.

Kelley v. Johnson, 425 U.S. 238, 47 L Ed. 2d 708, 96 S. Ct. 1440 (1976) A policeman sought redress under 42 USC §1983 because county regulations required a certain length of hair while on official duty. The Court held that this was valid as a viable state interest in the appearance of its officers.

Kenosha v. Bruno, 412 U.S. 507, 37 L Ed. 2d 109, 93 S. Ct. 2222 (1973) A suit was brought alleging a §1983 violation because the city had denied a liquor license renewal based on allegations of "nude dancing." This Court held that there was no jurisdiction over the city under §1983 because the city was not a person under that law. This Court held further that the intervention of the Wisconsin Attorney General might have cured the jurisdictional defect and remanded the matter to the lower Court for further proceedings along that line.

Meyer v. Nebraska, 262 U.S. 390, 67 L Ed. 1024, 43 S. Ct. 625 (1923). Suit was brought against a teacher who taught

German to a ten year old who had not passed the eighth grade. This teaching was in contravention of Nebraska statute. The Court held that it was not immoral to teach a foreign language; that there was no injury to public health or welfare; that this was an unnatural restriction of defendant's rights, and the statute was, therefore, unconstitutional. 42 USC §1983 was not involved in that case.

Parratt v. Taylor, No. 79-1734 cert. granted October 20, 1980. Certiorari was granted in this case in a suit brought by a prisoner against prison officials for alleged negligence in his treatment. In this particular case, the acts, if proved, were directed against this prisoner by the officials of the prison while in the course of their duties in caring for him.

Pierson v. Ray, 386 U.S. 547, 18 L Ed. 2d 288, 87 S. Ct. 1213 (1967) held that a factual question had been raised by the pleadings as to whether or not the officers had acted in good faith and remanded this question to the lower Courts to decide this issue.

Procunier v. Navarette, 434 U.S. 555, 55 L Ed. 2d 24, 98 S. Ct. 855 (1978). A prisoner brought suit under 42 USC §1983 claiming unreasonable interference with prisoners' outgoing mail. The state officials claimed qualified immunity. This Court held that state officials were entitled to immunity unless they "knew or should have known" that their actions would violate his federally protected rights or would cause other injury to the respondent.

Roe v. Wade, 410 U.S. 113, 35 L Ed. 2d 147, 93 S. Ct. 705 (1973) involves 28 USC §1253 and did not involve 42 USC §1983.

Stanley v. Illinois, 405 U.S. 645, 31 L Ed. 2d 551, 92 S. Ct. 1208 (1972). An Illinois statute provided that children of an unwed father, on the mother's death, would become state wards and placed in a guardianship. This Court held that to deprive the father of companionship and custody of his children without a hearing was invalid under the Equal Protection Clause, and that the Illinois statute was unconstitutional. The Ohio immunity statute regarding policemen on emergency runs has not been declared unconstitutional by this Court.

CONCLUSION

The United States Court of Appeals for the Sixth District was correct in sustaining the United States District Court for the Northern District of Ohio, Western Division in its dismissal of Petitioner's complaint for the reason that Petitioner failed to establish that her cause of action could be brought under 42 USC §1983 or under any other federal statute and that, in the absence of diversity of citizenship, the United States District Court did not have jurisdiction.

Respectfully Submitted:

RICHARD A. HAMILTON
455 Spitzer Building
Toledo, Ohio 43604
(419) 244-8393
Attorney for Respondent

SERVICE

Three copies of this Brief in Opposition to Petition for Certiorari have been sent by regular U.S. mail to the Attorneys for Petitioner, Benjamin B. Sheerer and Paula Goodwin, 614 Superior Avenue, W., Suite 611, Cleveland, Ohio 44113, this 20th day of March, 1981.

Richard A. Hamilton

RICHARD A. HAMILTON